AGENDA
COLORADO SUPREME COURT
RULES OF JUVENILE PROCEDURE COMMITTEE

Friday, August 7, 2020, 9:00 AM
Videoconference Meeting via Cisco Webex

I. Call to Order

II. Chair's Report
A. Approval of the 6/26/20 meeting minutes [pages 2-5]

III. Old Business
A. CASA in Rules? *See* Rule Proposal [page 6]
B. Adjudicatory Jury Trials (referred to CIP)
C. C.R.J.P. 3.7 & SB19-108 (referred to Juvenile Justice Committee)

IV. New Business
A. Rule Proposal from the Access to Justice Committee Re Interlocutory Appeal Advisement (Judge Welling) [pages 7-14]
- Two memos outlining committee's thinking on the issue
- *A.R. v. D.R.*, 20 CO 10

B. Proposed ICWA Rules (Judge Furman) [pages 14-18]

V. Adjourn
A. Next Meeting: **Next Meeting October 2, 2020, 9:00 AM,** via Webex or 4th floor Supreme Court Conference Room (public health circumstances permitting)

Cisco Webex

In order to use Webex, you need an internet connection and a device with a camera, microphone, and speaker (e.g., laptop, smartphone, or tablet). If you use a phone or tablet, you should consider a way to prop up your device. Also, should also think about a power source because videoconference can drain your battery.

You can download the Webex software (called "Webex Meetings") for free in advance here or from your favorite app store. You can also arrive slightly early to the meeting, click on the link, and then be prompted to download the software.

Once you enter the meeting, you may need to adjust your settings in the "Audio" menu (the Audio tab is at the top of the screen or can be found thru the ellipses button at the bottom next to the red X); there are options there which allow you to change your camera, speaker, and microphone, and to run tests to ensure that they're working.

If you have difficulties using a smart device, the original webex invite also includes call-in information, so that you can participate by phone.

Colorado Supreme Court Rules of Juvenile Procedure Committee
Minutes of June 26, 2020 Meeting

I. Call to Order

The Rules of Juvenile Procedure Committee came to order around 9:00 AM via videoconference. Members present or excused from the meeting were:

Name	Present	Excused
Judge Craig Welling, Chair	X	
Judge (Ret.) Karen Ashby, Chair		X
David P. Ayraud	X	
Magistrate Howard Bartlett		X
Jennifer Conn	X	
Sheri Danz	X	
Traci Engdol-Fruhwirth	X	
Judge David Furman	X	
Ruchi Kapoor	X	
Shana Kloek	X	
Wendy Lewis		X
Peg Long	X	
Judge Ann Meinster	X	
Judge Dave Miller		X
Chief Judge Mick O'Hara		X
Trent Palmer		X
Professor Colene Robinson	X	
Magistrate Fran Simonet		X
Judge Traci Slade	X	
Magistrate Kent S. Spangler		X
John Thirkell	X	
Pam Wakefield	X	
Non-voting Participants		
Justice Richard Gabriel, Liaison	X	
Terri Morrison	X	
J.J. Wallace	X	

Special Guests: Jenny Bender from CASA; Clancy Johnson, SA from 1st JD

Attachments & Handouts:
(1) Draft Minutes of 4/24/20 Meeting
(2) Emails from Peg Long Re CASA in Rules
(3) Excel Sheet of Issues with Draft Rules
(4) Judge Slade's Email
(5) C.R.J.P. 3.7 Materials

I. Call to Order

II. Chair's Report

A. The 4/24/2020 meeting minutes were approved by the committee.

III. Old Business

A. CASA in Rules? Peg Long

Peg Long pointed out that the current draft rules are silent on CASA volunteers. She noted that CASA operates by MOU with each individual jurisdiction and that procedures can vary throughout the state, but CASA is most effective when appointed at the earliest stage of the proceedings. Jenny Bender, Executive Director of CASA, was also present and related that CASA operates in 18 of 22 judicial districts and has served over 4500 children. Peg Long provided all the statutory references to CASA and the amendments made in HB19-1219. The committee discussed whether to repeat parts of the statute on appointing case in a rule. As with other issues, the committee goes back and forth on this. Judge Furman suggested trying to mention CASA appointments as part of the procedures (for example, combined with the rule on filing a petition, so "At time of filing the petition, the court must appoint a CASA if feasible."). Pam Wakefield mentioned that CASAs are appointed in several different case types and wondered about whether a CASA rule should be a general provision (applicable in all Children's Code cases) or whether we should have a D&N-specific CASA rule. The committee decided to focus on D&N for now.

The chair broke the issue down into two parts: (1) should we mention CASA in the rules; and (2) if so, what would be the proposed language.

David Ayraud noted that other case participants, GALs, special respondents, intervenors, etc. are mentioned in the rules and it would be strange to only exclude CASAs. The committee thought this was a good point and decided to draft proposed language. Peg Long, Judge Welling, and Judge Meinster will volunteer to draft a proposal. If anyone else is interested in helping, email J.J.

B. Reviewing Current Rules-See spreadsheet

The draft rules excel sheet was tabled. The chair is going to ponder a good way to facilitate discussion via webex.

IV. New Business

A. Judge Slade's Email Re Adjudicatory Trials

Judge Slade noted that she has now continued adjudicatory jury trials twice and will soon be doing it for the third time. Finding good cause is not as problematic as the consequences of leaving cases unresolved for long periods:

(1) Kids remaining out of home without an adjudication is troubling;
(2) Parents are entitled to a jury trial on the issues, and children are also entitled to have resolution;
(3) Cases remain pending with no treatment plan or services in place in the absence of an agreement;
(4) Though some jurisdictions can get waivers or variances from the Chief Justice to start jury trials, D&N cases are tough because there are more lawyers and parties than in a standard case and there is not enough room in a standard courtroom to accommodate the number of people.

Judge Slade reported 3 delayed cases in Douglas; Shana Kloek reported 4-6 in Arapahoe; Judge Meinster reported 13 in Jefferson.

On treatment issues, the court can enter a protective order, but the court has limited powers to do so. Committee members expressed concern that the law does not authorize the court to rely on its emergency powers for such long periods of time. Sheri Danz mentioned CJD 96-08 and also related that DANSR had discussed this issue and came up with a model protective order. She will find it, send it to J.J. and J.J. will email it to the committee.

John Thirkell indicated that chief justice directive may be a way to offer guidance. The committee recognized that these were serious issues worthy of attention. Judge Furman suggested putting the issue on CIP's agenda and inviting Judge Slade to the CIP meeting. The committee agreed that CIP is a good home to brainstorm solutions. The committee is open to make any rule changes to assist if CIP comes up with creative solutions. The committee tabled the agenda item to see what happens at the CIP meeting.

B. Judge Meinster's email Re C.R.J.P. 3.7; Materials by Clancy Johnson
The committee agreed that, as of July 1, the C.R.J.P. will be in conflict with the statute due to the Juvenile Justice Reform Act, SB19-108. Judge Furman pointed out that the law is clear in dealing with this situation—the statute controls over a conflicting rule. The question is whether the committee should act to amend the rule, and if so, what the amendment should look like. Professor Robinson expressed concern over changing a delinquency rule. She said that the current charge to the committee was to overhaul the D&N rules. She worried that, by making this change, it would appear that the committee has been regularly reviewing the delinquency rules and has signed off on all of them—that would be a false impression. Judge Slade felt reluctant to make changes to the delinquency rules without input from DAs and PDs and other delinquency stakeholders. That said, the committee was troubled by letting the conflict between the rule and statute persist. Sheri Danz recommended reaching out to the Juvenile Justice Committee. It meets the last Tuesday of the month. She will email the contacts for that committee so that Judge Welling, Clancy Johnson, and J.J. Wallace coordinate with them. The committee made three suggestions for amending the rule: (1) deleting (h) entirely;
(2) adding a reference to article 2 of title 19 to (h); or

(3) delete (h) and add findings language to (g) with a cross-reference to the statutes. These proposals will be referred to the Juvenile Justice Committee for input.

C. Ruchi Kapoor asked about the drafting subgroup. Judge Welling will work on it. Ruchi Kapoor, Judge Furman, Justice Gabriel, Sheri Danz, and Clancy Johnson volunteered.

V. Adjourn-Next Meeting August, 7 2020, 9:00 AM,

The Committee adjourned at approximately 10:40 A.M.

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Respectfully Submitted,
J.J. Wallace

CASA Rule[1]

(a) **Appointment.** The court may appoint a Court Appointed Special Advocate (CASA) volunteer by written order in a dependency and neglect case and should do so at the earliest opportunity.

(b) **Access to Information.** CASA volunteers have authority to review all relevant documents and interview all parties involved in the case, including parents, other parties in interest, and any other persons having significant information relating to the child.

(c) **Role and Responsibilities.** The role and responsibilities for the CASA volunteer appointed to the case are outlined by the statutes authorizing the CASA program, section 19-1-201 to -213, C.R.S., and in any local memorandum of understanding.

Commented [wj1]: Not required by statute but may be a good idea to make sure a volunteer has official documentation of their appointment (for example to take to an IEP meeting at the child's school). On the other hand, there may be logistical difficulties because there is no integrated system to automatically produce the order and we don't want it to be a burden on courts.

[1] Recommend placing the rule at the top in the general rules section after Attorney of Record.

From: Katayoun Donnelly
To: David Stark, Chair of the Colorado Access to Justice Commission Delivery Committee
Date: April 14, 2020

During our last meeting I brought up three access to justice issues that I think deserve this committee's attention.

I. Proposed amendment to Chief Justice Directive 05-03 to include all terminations of parental rights.

Recognizing that parental rights are among the most fundamental constitutional rights and "parental termination decrees are among the most severe forms of state action," *Santosky v. Kramer*, 455 U.S. 745 (1982), Chief Justice Directive 05-03 categorizes transcripts of termination of parental rights proceedings in Dependency and Neglect among those that should be paid for by the state.

> State-paid transcripts are all transcripts requested by judicial officers, the district attorney, public defender, the Office of the Child's Representative and its contract attorneys, pro se indigent criminal defendants or advisory counsel representing an indigent criminal defendant, the Attorney General's Office, the Office of the Alternate Defense and its contract attorneys[, and] the ***Office of Respondent Parents' Counsel*** and its contract attorneys. Colorado Judicial Branch court reporters who prepare transcripts as a normal part of their job and compensation shall be allowed to prepare state-paid transcripts during work hours.

CJD. 05-03 V.B.3. (emphasis added).

> The court may provide additional copies of these state-paid transcripts without any additional expense to the attorney general, district attorney, public defender, Office of the Child's Representative, pro se indigent criminal defendant or advisory counsel representing an indigent criminal defendant, Alternate Defense Counsel and ***state-paid***

> ***respondents' attorneys in dependency and neglect cases***. If a court reporter is no longer a full-time, part-time or contract employee of the Colorado Judicial Branch, individuals may obtain copies of these transcripts at the rate set forth in the Colorado Judicial Department Fiscal Rules by contacting the district administrator of the district.

Id. VI.J. (emphasis added).

Unfortunately, the current language of CJD 05-03 only covers one, out of three, statutory provision allowing termination of parental rights under the Children's Code. In addition to terminations under Article 3, i.e, Dependency and Neglect (D&N) proceedings, the Code also allows termination under two different parts of Article 5, i.e., Part I (Relinquishment) and Part II (Adoption). Even though terminations pursuant to Part II of Article 5 are no less severe forms of state action, because these are not D&N proceedings and because these indigent parents are not represented by the Office of Respondent Parent Counsel, the current language of CJD 05-03 V.B.3 and VI.J does not cover them. This seems to have been an oversight that could be easily fixed to provide equal access to justice to indigent parents and children subject to Article 5 proceedings.

II. Proposed new chief justice directive regarding advisement of right to appeal in termination of parental rights cases.

The recent opinion of the Colorado Supreme Court, *A.R. v. D.R.*, 2020 CO 10, states that interlocutory appeals of adjudication orders in D&N cases are mandatory appeals and the failure to file a timely appeal will result in the waiver of parents'

constitutional and statutory rights. Unfortunately, however, *A.R.* does not address whether in order to protect parents' right to a fundamentally fair process under *Santosky*, trial courts that issue such orders have a duty to advise parents (and especially *pro se* parents) of their right to appeal and the irreversible consequences of not filing a timely appeal.

In comparable criminal proceedings where fundamental constitutional rights are at stake, both the state and federal rules of procedure, as well as notions of fundamental fairness, require trial judges to advise litigants, on the record, of their right to direct and postconviction appeal and, if they are indigent, of their right to proceed *in forma pauperis*. Fed. R. Crim. P. 32;[1] Colo. R. Crim. P. 32(c);[2] *see also,*

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[1]

> (j) Defendant's Right to Appeal.
> (1) Advice of a Right to Appeal.
> (A) Appealing a Conviction. If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction.
> (B) Appealing a Sentence. After sentencing--regardless of the defendant's plea--the court must advise the defendant of any right to appeal the sentence.
> (C) Appeal Costs. The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis.
> (2) Clerk's Filing of Notice. If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.

Fed. R. Crim. P. 32(j).

[2]

> (c) Advisement.
> (1) Where judgment of conviction has been entered following a trial, the court shall, after passing sentence, inform the defendant of the right to seek review of the conviction and sentence, and the time limits for filing a notice of appeal. The court shall at that time make a determination whether the defendant is indigent, and if so, the court shall inform the defendant of the right to the assistance of appointed counsel upon review of the defendant's conviction and sentence, and of

e.g., Boruff v. United States, 310 F.2d 918, 921–22 (5th Cir. 1962) ("the ten day period within which Boruff was required to file his notice of appeal did not commence to run until he was actually notified of his right to appeal and his right to have counsel to assist him, under the peculiar facts of this case.").

Considering the importance of this issue, this could be also addressed in a new Chief Justice Directive.

III. Proposal to address the issue of accessibility of data regarding resources available to indigent litigants.

One of the first results of Google searches for variants on *pro bono* lawyers or services in Colorado is the CBA page on *pro bono* opportunities for attorneys. The others are CLS, MVL, and CLC pages. The committee could contact the CBA, CLS, MVL, and CLC to propose adding a link with directions to all available *pro bono* services.[3] The committee could also ask the Supreme Court to include such a link on its website (and to work on its search engine optimization in order to get it to come up early in the results for *pro bono* searches in Colorado).

> the defendant's right to obtain a record on appeal without payment of costs. In addition, the court shall, after passing sentence, inform the defendant of the right to seek postconviction reduction of sentence in the trial court under the provisions of Rule 35(b).

Colo. R. Crim. P. 32 (c).

[3] For example, the opening page on the Metro Denver Lawyers site has a button that says "I need help."

To: The Colorado Access to Justice Commission
From: David Stark, Chair, Delivery Committee of Colorado Access to Justice Commission
Date: June 29, 2020
Re: Proposed Rule 4.3.5 of Colorado Rules of Juvenile Procedure

The Colorado Supreme Court recently concluded that, in a dependency or neglect case, a parent may not wait after entry of a termination order to appeal the earlier order adjudicating the child dependent or neglected. The court ruled that the time to appeal an adjudication order begins to run upon entry of such order. As such, the failure of a parent to file a timely appeal from an adjudication order will result in the waiver of parents' constitutional and statutory claims that could have been raised in a timely appeal. *A.R. v. D.R.*, 2020 CO 10, ¶¶ 41-42, 456 P.3d 1266, 1276-77. The *A.R.* opinion, however, does not address whether to protect parents' right to a fundamentally fair process under *Santosky v. Kramer*, 45 U.S. 745 (1982) trial courts that issue such orders have a duty to advise parents (and especially *pro se* parents) of their deadline to appeal adjudication orders and the irreversible consequences of not filing a timely appeal.

In comparable criminal proceedings where fundamental constitutional rights are at stake, both the state and federal rules of procedure, as well as notions of fundamental fairness, require trial judges to advise litigants, on the record, of their right to direct and postconviction appeal and, if they are indigent, of their right to

proceed *in forma pauperis*. Fed. R. Crim. P. 32;[1] Colo. R. Crim. P. 32(c);[2] *see also* *Boruff v. United States*, 310 F.2d 918, 921-22 (5th Cir. 1962) ("the ten day period within which Boruff was required to file his notice of appeal did not commence to run until he was actually notified of his right to appeal and his right to have counsel to assist him, under the peculiar facts of this case."); C.R.M. 7 (requiring magistrates to include advisements of appeal rights in orders and judgments).

1

> (j) Defendant's Right to Appeal.
> (1) Advice of a Right to Appeal.
> (A) Appealing a Conviction. If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction.
> (B) Appealing a Sentence. After sentencing--regardless of the defendant's plea--the court must advise the defendant of any right to appeal the sentence.
> (C) Appeal Costs. The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis.
> (2) Clerk's Filing of Notice. If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.

Fed. R. Crim. P. 32(j).

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> (c) Advisement.
> (1) Where judgment of conviction has been entered following a trial, the court shall, after passing sentence, inform the defendant of the right to seek review of the conviction and sentence, and the time limits for filing a notice of appeal. The court shall at that time make a determination whether the defendant is indigent, and if so, the court shall inform the defendant of the right to the assistance of appointed counsel upon review of the defendant's conviction and sentence, and of the defendant's right to obtain a record on appeal without payment of costs. In addition, the court shall, after passing sentence, inform the defendant of the right to seek postconviction reduction of sentence in the trial court under the provisions of Rule 35(b).

Colo. R. Crim. P. 32(c).

The Delivery Committee believes that a new Rule of Juvenile Procedure is needed to ensure that parents (and, in particular, *pro se* parents) facing possible termination of their parental rights do not inadvertently waive important statutory and constitutional rights by failing to timely appeal issues related to an adjudication.

The attached proposed Rule 4.3.5 would require that the written disposition order following an adjudication that a child is dependent or neglected advise the parties of their right to an immediate appeal of the adjudication and disposition orders, the date by which the notice of appeal must be filed, the consequences of failing to file a timely appeal, and related matters. The proposed rule would also require counsel representing parties to the proceeding to file a verification affirming that they have notified their clients of this advisement.

The Delivery Committee requests that the Commission submit this proposal to the Rules of Juvenile Procedure Committee or, alternatively, authorize the Delivery Committee to submit the proposal in its own name.

I. ***Proposed Rule of Juvenile Procedure—in light of A.R. v. D.R., 2020 CO 10 (holding that interlocutory appeals of adjudication orders in D&N cases are mandatory appeals and the failure to file a timely appeal will result in the waiver of parents' constitutional and statutory rights).***

Proposed Rule:

Rule 4.3.5 Advisement of the Right to Appeal

(a) As provided in Section 19-1-109(2)(c), C.R.S., an order adjudicating a child to be neglected or dependent shall be a final and appealable order upon the entry of the disposition order pursuant to Section 19-3-508, C.R.S.

(b) The court's written disposition order shall advise the parties of their right to appeal the adjudication and disposition orders. The advisement shall inform the parties of the following:

(1) The date by which the notice of appeal must be filed in the court of appeals;

(2) That all claims arising out of the adjudication and disposition proceedings, including claims of ineffective assistance of counsel, must be raised in a timely appeal or will be waived;

(3) That indigent parties have the right to the assistance of appointed appellate counsel and the right to obtain a record on appeal without payment of costs; and

(4) *Pro se* litigants may obtain assistance from the self-represented litigant coordinator for the district in which the juvenile court is located or the court of appeals concerning the procedures for filing the notice of appeal and obtaining necessary forms. Indigent litigants may also seek appointment of an attorney through the Colorado Bar Association Appellate Pro Bono Program at https://www.cobar.org/For-Members/Committees/Appellate-Pro-Bono.

(c) The disposition order shall include the advisement prescribed in section (b) of this rule regardless of whether the adjudication order was entered after a contested or uncontested hearing or there was an admission, stipulation, confession, or any other form of response to the State's petition alleging that the child is dependent or neglected.

(d) Within seven business days of the entry of the order, counsel for represented parties shall file a verification affirming that they have notified their client or clients of this advisement and specifying the date, time, and manner of doing so.

Proposed ICWA Rules[1]

APPLICATION

This rule applies to all child custody proceedings as defined 25 U.S.C. section 1903(1), including but not limited to, dependency and neglect cases.

Comment

[1] ICWA applies to any "child custody proceeding." Multiple child custody proceedings can occur throughout a dependency and neglect case and may include, but not be limited to, shelter hearings, dispositional hearings, placement hearings, hearings on motions to terminate the parent-child legal relationship, and pre-adoptive and adoptive placement hearings. Even if the child is a member of or eligible for membership in more than one Tribe, only one tribe can be designated as the Indian child's Tribe. *See* 25 C.F.R. § 23.109 and 25 U.S.C. § 1903(5).

[2] The substantive and procedural requirements of the Indian Child Welfare Act of 1978 are set out in 25 U.S.C. §§ 1901 to -1963. Related regulations, adopted in § 19-1-126(1), C.R.S., are found in part 23 of title 25 of the C.F.R. This rule is intended to ensure compliance with these laws.

INQUIRY

(a) The court shall make inquiries to determine whether the child who is the subject of the proceeding is an Indian child, and, if so, shall determine the identity of the Indian child's tribe. In determining the Indian child's tribe:

(1) The court shall ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is to be made at the commencement of the proceeding, and all responses must be on the record. The court shall instruct the participants to inform the court if any participant subsequently receives information that provides reason to know the child is an Indian child.

(2) Any party to the proceeding shall disclose any information indicating that the child is an Indian child or provide an identification card indicating membership in a tribe to the petitioning and filing parties and the court in a timely manner. The court shall order the party to provide the information no later than seven business days after the date of the hearing or prior to the next hearing on the matter, whichever occurs first. The information should be filed with the court and

[1] The proposal reflects a consensus of the subcommittee. The subcommittee had a minority view that no rule should repeat a statute or regulation, and thus should only reflect (1) an intention to secure compliance with ICWA and (2) needed additional procedural requirements for tribal intervention, transfer, and active efforts. Also, it was pointed out that ICWA applies to D&N cases and these rules were drafted with a view towards application in D&N cases. But ICWA may also apply to other case types in the Children's Code. Thus, the committee should weight placement of these rules in the rules applicable only to D&N cases against placement of ICWA rules in a general provisions section applicable to all types of Children's Code cases. If the latter, then the committee should review the rules and make any necessary amendments to address broader applications.

provided to the county department of human or social services and each party no later than seven business days after the date of the hearing.

Comment

[1] There may be more than one possible tribe, and the court inquiry and participants must contemplate the possibilities of multiple tribes. The purpose of the inquiry is to identify tribes in which the child is a member or may be eligible for membership, but the tribes have the final determination as to whether the child is a member or eligible for membership.

[2] "Involuntary child custody proceeding" includes, but is not limited to, a termination hearing, and the court must inquire at each separate proceeding.

[3] *See* § 19-1-103(65.3)–(65.7) for definitions of Indian child, Indian child's tribe, and Indian tribe.

NOTICE REQUIRED FOR ALL CHILD CUSTODY PROCEEDINGS

(a) If the court knows or has reason to know, as defined in section 19-1-126(1)(a)(II), C.R.S., that the child who is the subject of the proceeding is an Indian child, the court must verify the petitioning or filing party sent notice by registered or certified mail, return receipt requested, to the parent or parents, the Indian custodian or Indian custodians of the child, and to the tribal agent of the Indian child's tribe as designated in 25 C.F.R. section 23.12, or, if there is no designated tribal agent, the petitioning or filing party shall contact the tribe to be directed to the appropriate office or individual. In providing notice, the court and each party shall comply with 25 C.F.R. section 23.111.

(b) The petitioning or filing party shall disclose in the complaint, petition, or other commencing pleading filed with the court that the child who is the subject of the proceeding is an Indian child and the identity of the Indian child's tribe or what efforts the petitioning or filing party has made in determining whether the child is an Indian child. If the child who is the subject of the proceeding is determined to be an Indian child, the petitioning or filing party shall further identify what reasonable efforts have been made to send notice to the persons identified in [subsection (a) of this section]. The postal receipts indicating that notice was properly sent by the petitioning or filing party to the parent or Indian custodian of the Indian child and to the Indian child's tribe must be attached to the complaint, petition, or other commencing pleading filed with the court; except that, if notification has not been perfected at the time the initial complaint, petition, or other commencing pleading is filed with the court or if the postal receipts have not been received back from the post office, the petitioning or filing party shall file the postal receipts with the court. Any responses sent by the tribal agents to the petitioning or filing party, the county department of human or social services, or the court must be distributed to the parties and deposited with the court.

Comment

[1] If there is reason to know the child is an Indian child, the court must treat the child as an Indian child.

[2] See § 19-1-126(1)(c), C.R.S. for guidance on filing notice and return receipts with the court.

TRIBAL INTERVENTION

(a) In any proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(b) Any party seeking to intervene must comply with [*cite standard intervention rule*: C.R.C.P. 24 or C.R.J.P___].

TRANSFER

(a) Either parent, the Indian custodian, or the Indian child's tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's tribe.

(b) The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding.

(c) Upon request for transfer, the State court must ensure that the tribal court is promptly notified in writing of the transfer request. This notification may request a timely response regarding whether the tribal court wishes to decline the transfer.

(d) The court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because: (1) either parent objects to the transfer; (2) the tribal court declines the transfer; or (3) good cause exists for denying the transfer.

(e) An objection to transfer must state the reasons for that belief or assertion and must be stated orally on the record or provided in writing on the record and to the parties to the child-custody proceeding.

Comment

See 25 U.S.C. § 1911(b) and 25 C.F.R. §§ 23.115 through 23.119 for guidance on transfer to a tribal court. *See also* §19-1-126(4), C.R.S.

ACTIVE EFFORTS

In any case involving an Indian child, active efforts must be documented in the record. A court must make findings that active efforts were made prior to ordering foster care placement or termination of parental rights.

Comment

See the definition of "active efforts" in 25 C.F.R. § 23.2 for guidance. *See also* 25 U.S.C. § 1912(d).

QUALIFIED EXPERT WITNESS TESTIMONY REQUIRED

Foster care placement of or termination of parental rights to an Indian child may not be ordered in the absence of testimony of at least one qualified expert that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Comment

See whom may serve as a qualified expert witness in 25 C.F.R. § 23.122. *See also* 25 U.S.C. § 1912(e) and (f).

PLACEMENT PREFERENCES

(a) The party seeking the placement of the Indian child shall:

(1) specify either a placement within the placement preferences in 25 U.S.C. § 1915, 25 C.F.R. section 23.130, and 25 C.F.R. section 23.131, prioritized according to the order of preference, or another preferred placement specified by the Indian child's tribe by resolution, or provide evidence that there is good cause to deviate from the preferences set forth in ICWA and the Code of Federal Regulations;

(2) using due diligence, inform the court if the Indian child's tribe has established a different order of preference by resolution; and

(3) provide evidence that the proposed placement is the least restrictive placement which most approximates a family and that the placement is within reasonable proximity to the Indian child's home, extended family, or siblings, and taking into account the child's special needs, if any.

(b) The court shall consider the preference of the Indian child, where appropriate, and the preference of a parent of the Indian child, provided that in the case where a parent requests a non-preferred placement, that request may be considered by the court only if the parent has reviewed all available preferred placements which can be identified using due diligence.

(c) In the case of a voluntary foster care placement requiring court approval, the court shall give weight to a parent's request for anonymity in applying the preferences.

Comment

See the requirements of 25 C.F.R. § 23.130 through 25 C.F.R. § 23.132 concerning placement preferences.